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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER B. MEARS, a
Professional Corporation,

Plaintiff, Cross-defendant and
Respondent,

v.

REM PHYSICAL THERAPY,

Defendant, Cross-complainant and
Appellant.

G042204

(Super. Ct. No. 30-2008-00107387)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila
Fell, Judge. Reversed.

Law Office of Craig McLaughlin and Craig McLaughlin for Defendant,
Cross-complainant and Appellant.

Christopher B. Mears; Law Office of Jan Rainbird and Jan Rainbird for
Plaintiff, Cross-defendant and Respondent.

Does an attorney lien for fees and costs have priority over a lien for medical services? We agree with *Gilman v. Dalby* (2009) 176 Cal.App.4th 606 that it does. And, even though it decided the case before *Gilman* was filed, the trial court reached the same conclusion. But unfortunately the court made its decision in the form of an order sustaining cross-defendant's demurrer without leave to amend. And, in doing so, the court made certain factual assumptions not apparent from the face of the cross-complaint. Thus, we must reverse the judgment although the cross-complainant's victory may well prove to be a Pyrrhic one.

FACTS AND PROCEDURAL HISTORY

Christopher B. Mears, a lawyer in the firm of plaintiff and cross-defendant Christopher B. Mears, a Professional Corporation, represented Carrie Barragan in her action for personal injuries against the City of Lakewood. Mears claims there were a number of medical liens and the judgment obtained in the action was insufficient to cover the amount of these liens, the attorney fees, and the costs advanced. Mears filed a complaint in interpleader against six holders of medical liens, including defendant and cross-complainant REM Physical Therapy, depositing \$17,237 with the court. He had withheld \$35,760 allegedly for his 40 percent attorney fees and \$36,402 for costs he advanced. According to the complaint in intervention, REM's medical lien was the sum of \$17,201.

REM cross-complaint against Mears for breach of contract, conversion, breach of fiduciary duty, and common counts. It alleged that, because its lien was created prior to Mears representing plaintiff in the underlying action and because Mears knew of its lien and signed an agreement to protect REM's lien, REM's lien was superior to Mears's lien. Attached to the cross-complaint was a copy of REM's "medical provider's lien" bearing an undecipherable signature, alleged to be Mears's. The signer, identified

as Barragan's attorney of record, agreed to "observe all terms of the above and agree to withhold such sums from any settlement, judgment, or verdict in trust for REM as may be necessary to protect REM. . . . As fiduciary, I agree to promptly disburse to REM such sums owed REM under the terms of this agreement."

Mears demurred to the cross-complaint. In his memorandum of points and authorities, he asserted a number of facts not appearing on the face of the cross-complaint, including that plaintiff's net verdict in the underlying suit was \$89,400, that his fee agreement provided for a 40 percent contingent fee, or \$35,760, and that \$36,402 was reimbursed to him as costs incurred. He further asserted that the total medical liens amounted to \$67,345 and that all lien claimants except REM agreed to accept a smaller proportional amount. As to the legal issues, he argued that his liens took priority over the medical liens. The trial court sustained the demurrer without leave to amend.

DISCUSSION

1. The court went beyond the face of the cross-complaint in ruling on the demurrer.

"On appeal from a judgment of dismissal following the sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.]" (*Gilman v. Dalby*, *supra* 176 Cal.App.4th at p. 612.) A demurrer can be sustained only if fatal defects appear on the face of the complaint, or if fatal defects are identified by taking judicial notice of facts outside the pleadings. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) And therein lies the rub. There is nothing in REM's cross-complaint that provides support for the facts asserted in Mears's memorandum of points and authorities that he, in fact, had a contingent fee contract for 40 percent of the judgment and that he incurred costs of \$36,403. Nor does it appear from the face of the cross-complaint what the amount of the judgment was in the underlying case. It is true

that the court could have taken judicial notice of the latter fact but there is nothing in the record to indicate that the court was requested to do so.

It is also true that the cross-complaint contains the following paragraph: “REM’s counsel and Mears thereafter engaged in correspondence, wherein Mears finally revealed that it took for itself from the judgment proceeds a full 40 [percent] contingency fee in the amount of \$35,760.34. Mears also indicated that it paid purported expenses in the amount of \$36,402.96.” (Capitalization omitted.) Furthermore, a copy of Mears’s letter containing these same contentions is attached to the cross-complaint as an exhibit. But by this language REM did not admit these facts.

In sustaining the demurrer the trial court obviously assumed the truth of Mears’s contentions as to the amount of the judgment in the underlying case, the terms of his contingent fee contract, and the amount of expenses he incurred in pursuing the case. This the court was not permitted to do. The ultimate decision may have been the correct one. And it might well have been reached on a motion for summary judgment. But the demurrer was not well taken.

2. The appeal is not moot.

Mears also contends the appeal is moot because REM has now recovered more than the amount of its lien. In making this argument, Mears fails to provide us with any citation to the record. The record does contain a proposed judgment in the interpleader action in favor of REM in the amount of \$17,237. If this judgment was entered, it would appear that none of the other defendants in the interpleader action answered the complaint and the entire amount was awarded to REM. The complaint alleged that the amount of REM’s lien was \$17,201. Thus, if the foregoing assumptions are correct, REM received \$36 more than its lien amount.

REM responds that it is entitled to more, in the form of costs, attorney fees, and punitive damages. We are not ruling that REM is entitled to any of these items. But as long as the cross-complaint stands, we cannot ignore its contentions.

DISPOSITION

The judgment is reversed. In the interest of justice, each party shall bear its own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.